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Family Planning and Its Limits

DOV FOX*

A doctor botches a vasectomy. Or says it'd be dangerous to keep a healthy pregnancy. Or misses a risk of passing along disease. Our laws do little to deter such reproductive negligence or compensate its victims. Some of this misconduct leaves people without the baby they desperately want. Other times, it foists on parents a child they'd set out to avoid. Or one with meaningfully different traits than what they were led to believe.

I call these three harms procreation *deprived*, procreation *imposed*, and procreation *confounded*.

Thousands of fertility patients were *deprived* of biological parenthood when their embryos were destroyed in a freezer meltdown.[1] Pregnancy was *imposed* on hundreds of women whose birth control pills were packaged upside-down.[2] And scores of parents had procreation *confounded* when

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* © 2021 Dov Fox. Herzog Endowed Scholar; Professor of Law; Director, Center for Health Law Policy & Bioethics. I owe more than the usual thanks: to Larry Alexander, Steve Smith, and Stacee Groff for organizing the proceedings that were occasion for these exchanges; to Deans Robert Shapiro, Margaret Dalton, and Stephen Ferruolo for the generous support that made it possible; to Reuven Brandt, Ellen Bublick, Richard Epstein, Peter Schuck, David Wasserman, and Robin West for stimulating deliberations; to Naomi Cahn, June Carbone, Glenn Cohen, Courtney Joslin, Kaipo Matsumura, and Doug NeJaime for valuable conversations; and to Liz Parker and Sasha Nuñez for exceptional editing.

1. *See, e.g.*, Doe v. Airgas USA, No. 2014-L-000869 (Ill. Cir. Ct. Cook Cty. dismissed Oct. 2, 2018); Danielle Zoellner, *Second Fertility Clinic in the Last Week Has a Freezer Failure*, DAILY MAIL (Mar. 11, 2018, 6:05 PM EDT), https://www.dailymail.co.uk/news/article-5488507/Eggs-embryos-possibly-damaged-California-clinic.html [https://perma.cc/8QG5- F37Q].

2. *See, e.g.*, Ramirez v. Vintage Pharmaceuticals, Inc., 852 F.3d 324, 327 (3rd Cir. 2017); Allyson Chiu, *"Unintended Pregnancy": Nearly 170,000 Allergan Birth Control Packs Recalled*, WASH. POST (May 30, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/05/30/nearly-170000-allergan-birth-control-packs-recalled-after-error-leaves-pillsout-of-order/?utm_term=.89e087a49595 [https://perma.cc/2NM5-Y3HM].

the donor a sperm bank claimed was a Ph.D. genius with a spotless record had actually spent years bouncing between prison and psychiatric hospitals amid struggles with mental illness.[3] American courts have long denied remedies for reproductive misconduct under the laws of contract, property, or torts. *Birth Rights and Wrongs* maps out this terrain, explains why it matters, and sets forth principled ways to respond to those losses, while curbing collateral damage to innovation, access, or values.[4]

I'm grateful to Robin West, David Wasserman, Richard Epstein, Reuven Brandt, and Peter Schuck for their searching engagement with these ideas. West is wary of valorizing an intentional approach to reproductive life she says marginalizes people who don't plan out their family lives, or can't.[5] Wasserman argues that entitling parents to select genetic traits would endanger key norms of social equality and inclusion.[6] Brandt makes the case that my proposals don't go far enough when it comes to anonymous donors and "lovers who lie."[7] Epstein contends that reproductive mishaps are a price worth paying for the extraordinary advances in medicine and technology.[8] Schuck pulls these challenges together in his introduction to the volume.[9] The essays are richer than I can do justice to in the pages that follow. Their trenchant insights leave me grateful for this occasion to reflect on and either build out or revise the themes developed in *Birth Rights and Wrongs*.

I linger on Robin West's appraisal because it goes to first principles: from the common law methodology I adopt to the tort rights around family planning I would recognize. I'm humbled by what good West finds in the book.[10] But the friendly nature of her critique shouldn't obscure its depth

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3. *See, e.g.*, Norman v. Xytex Corp., 848 S.E.2d 835, 837–38 (2020); Christine Van Dusen, *A Georgia Sperm Bank, a Troubled Donor, and the Secretive Business of Babymaking*, ATLANTA MAG. (Feb. 13, 2008), http://www.atlantamagazine.com/great-reads/georgia-sperm-bank-troubled-donor-secretivebusiness-babymaking/ [https://perma.cc/252G-TTS9].

4. DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW (2019) [hereinafter FOX, BIRTH RIGHTS AND WRONGS].

5. Robin West, *Intentional Procreation*, 23 J. CONTEMP. LEGAL ISSUES 7 (2021).

6. David Wasserman, *The Moral Cost of Compensatory Damage Claims in Reproductive Negligence Cases*, 23 J. CONTEMP. LEGAL ISSUES 31 (2021).

7. Reuven Brandt, *Birth Rights and Wrongs Extended*, 23 J. CONTEMP. LEGAL ISSUES 49 (2021).

8. Richard A. Epstein, *Birth Rights and Birth Wrongs Through a Common Law Lens: Why the No Liability Regime is Likely to Endure*, 23 J. CONTEMP. LEGAL ISSUES 67 (2021).

9. Peter Schuck, *Introduction to Symposium on Professor Dov Fox's* Birth Rights and Wrongs, 23 J. CONTEMP. LEGAL ISSUES 3 (2021).

10. The "feminism" and "humanism" she attributes to *Birth Rights and Wrongs* bears the mark of West's contributions to civil rights, family life, legal professionalism, and jurisprudence. *See, e.g.*, ROBIN L. WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL

or force. West argues that I give short shrift to the values that animate the common law, and to where those values come from. Chief among them is a deliberative approach to reproductive life she traces back to competing worldviews about relationships between men and women, parents and children, humans and nature.[11] West is also critical of how I argue by analogy to similar contexts and controversies in reasoning about case law that's "reluctant to recognize reproductive losses as real or serious."[12] Judges tend to shrug these harms off as trivial or speculative, insisting redress would "invite fraud or smother spontaneity."[13] I maintain that this doctrine reflects "implicit judgments about the (in)significance or (un)worthiness" of the family planning it fails to protect.[14] Courts operate on the assumption that in matters of procreation—getting pregnant, or not; giving birth to kids of this kind or that—it's ultimately a crapshoot, whether it involves state-of-the-art medical technology or not.[15]

The result I uncover is a legal system that treats reproductive misconduct "less like mischief than misfortune," the kind of brute luck or cosmic injustice you "steel yourself against and move on from,"[16] resigned "that 'it was meant to be' or that 'God had something else in mind.'"[17] I deem the law's indifference unjust, and advocate tort protections for negligence victims left without the baby they set out to have, or with the one they

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FOUNDATION (2019); IN SEARCH OF COMMON GROUND ON ABORTION: FROM CULTURE WAR TO REPRODUCTIVE JUSTICE (ROBIN L. WEST ET AL. EDS., 2014); ROBIN L. WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION (2011); ROBIN L. WEST, MARRIAGE, SEXUALITY, AND GENDER (2007); ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW (2003).

11. In the landmark abortion case *Planned Parenthood v. Casey*, Justice Sandra Day O'Connor articulated something like these rival visions "concerning not only the meaning of procreation but also human responsibility and respect for it."

> One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent.

Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833, 853 (1992). For discussion, see NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 96 (2010).

12. FOX, BIRTH RIGHTS AND WRONGS, at 37.
13. *Id.* at 79.
14. *Id.* at 61.
15. *Id.* at 132.
16. *Id.* at 8.
17. *Id.* at 19.

tried not to have. West counters that I take for granted that it's good to plan out your reproductive life with attention and forethought.[18] She says that my proposed rights reflect this ideal of intentional procreation and that codifying them would have the effect of reinforcing it. West is unsure whether this idea is all that attractive, and thinks that our legal system shouldn't be so quick to prop it up. Giving pride of place to intentional procreation doesn't just demean non-planners, in her view. It diminishes a sense of shared responsibility for the needs of the families they form. But I don't think my book assumes family planning is the only or best way to go about reproductive life. And if adoption of my proposed torts had the effect of strengthening that ideal, I doubt the fallout would be as bad as West suggests, or worth trading off against the benefits that rights recognition affords.

West argues that "intentional procreation" runs through the book as something like an unstated premise in need of acknowledgement, development, and defense. She fully appreciates this ideal reflects little of the customary confusion and unpredictability we face when sex risks pregnancy, the natural lottery does its thing, and parenting doesn't go according to plan. West expounds a "now-conventional morality around reproduction" that "the kind of parenting we should engage in, whether or not we do" involves having children only "when you intend to, and, by implication if not explicitly, to only intend to do so when you can do so responsibly."[19] She includes within this ideal of responsible reproductive intending a bundle of "bromides[] so familiar perhaps as to seem natural and necessary": "having only planned as opposed to unplanned children; [] having 'control' over their births, spacing and sequencing; [] having children only at a point in mature adult life where parenting of young children fits into a rational life plan;

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18. She has leveled similar critiques elsewhere. *See, e.g.*, Robin West, *A Marriage is a Marriage is a Marriage: The Limits of Perry v. Brown*, 125 HARV. L. REV. F. 47, 48–49 (2012) (arguing that the Ninth Circuit's marriage equality decision omits critical context and meanings about marriage by appeal to truncated reasoning that "proceeds from premises to a conclusion by focusing myopically on a handful of legally relevant facts, declaring *x* like *y*, finding the matter settled, and leaving out of consideration altogether whatever social, cultural, historical, linguistic, legal, and even constitutional dimensions of x rendered it of interest in the first place"); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1422 (2009) (framing *Roe* as "a truncation of the aspirational feminist vision of reproductive justice from which it was forged," arguing the abortion right was "cut to size so as to fit the demands of doctrine, of standing requirements, of what the fifth Justice might believe, and of the principles laid down by the past," just as "*Brown* truncated the claims of racial justice . . . to a bare right not to be irrationally discriminated against by the state on the basis of skin color" and *Miranda* trimmed the "aspiration of a decent criminal justice system, not riddled by racism and contempt of criminal defendants" down to "a crude right to be 'Mirandized'").

19. West, *Intentional Procreation*, *supra* note 5, at 15–16.

[] having children only if and when one can afford to raise them; . . . and [] having a thought-through plan for covering the costs of their future young adulthood experiences, including their college tuitions; and [] doing all of this intending and planning before the first child is even in utero."[20]

This ideal is a familiar one. Liberals take its goodness for granted when they champion "reproductive freedom" and "planned parenthood" and "my body, my choice." Conservatives meanwhile decry deadbeat dads and single, welfare, or teenage mothers who stumble into parenthood as stupid, reckless, shirking, immature, promiscuous, or pathetic.[21] Better to reproduce responsibly, with purpose and a plan. The baseline of intentional procreation operates powerfully in the background of American moral culture.[22] It's also so central to individual and social wellbeing that, the book notes, the "U.S. Centers for Disease Control and Prevention ranks family planning among the 'ten great public health achievements' in the twentieth century."[23] West argues that I presume this ideal of intending conception and contraception is almost too obvious to need explaining.[24]

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20. *Id*. at 15.

21. Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339 (1996).

22. West thinks that elevating the scripted approach to making babies betrays an elitist orientation around middle-class milestones like marriage, a college degree, and home ownership. Here, she echoes June Carbone and Naomi Cahn's research showing that lower-income couples "are less likely to plan their pregnancies" or "memorialize their intentions about parental rights and responsibilities" in ways that "reflect community norms" about faith, intimacy, and social relationships. *See* June Carbone & Naomi Cahn, Jane the Virgin *and Other Stories of Unintentional Parenthood*, 7 U.C. IRVINE L. REV. 511, 514 (2017) ("The law of assisted reproduction ratifies and incorporates elite approaches to reproduction, which involve planning and consent.") (footnotes and citations omitted).

23. FOX, BIRTH RIGHTS AND WRONGS, at 15.

24. West is right that I missed an opportunity to interrogate with greater care what makes planning out one's family life a worthwhile social practice, one that deserves protecting under the law. But I don't want to overstate the work that intentional procreation does in my argument. I don't treat this ideal of reproductive intending as either universal or monolithic, conceptually crude or morally compulsory. Nor does that notion assume the normative primacy West ascribed to it in my ideas or proposals. She claims the book is at its core about "forming and acting on intents to live one's reproductive life in a certain way" and not "reproducing, or contracepting, or raising children per se." West, *Intentional Procreation*, *supra* note 5, at 13. But I expressly rejected any uniform right for intentional procreation because doing so "would flatten out finer-grained distinctions among" decisive practical impacts of having procreation deprived, imposed, or confounded. FOX, BIRTH RIGHTS AND WRONGS, at 74. The central harm in each has less to do with intentions for the sake of intending, than with the aftermaths of these particular intentions for people's lives. In other words: that harm isn't being robbed of control over whether, when, or with

But *Birth Rights and Wrongs* doesn't insist that it's good for everybody to devise and carry out a sketch for the shape their family life should take. And I don't think my proposals crowd out or look down on unintended conception or contraception. Intentional procreation is one reproductive ideal among others, an ideal that many people find worthwhile and valuable for their lives. I think they should be free from negligence to pursue plans for whether, when, and how to have children. A large fraction of the population can't reproduce *without* intending it: if their health, sexual orientation, or relationship status, for example, leaves them unable to conceive or gestate without help from a donor, surrogate, clinic, or agency they must (intend to) enlist.[25] But other people end up having kids as a function of chance or circumstance, whether it's something they "fell into" or "lucked into," got "forced into" or "stuck with."[26] And not everyone's a planner. For some, the prospect of pregnancy or childlessness invites a mishmash of ambivalence, spontaneity, and openness. Perhaps they're of two minds, or go-with-the-flow, or game to abide whatever fate or nature brings them. For others, charting out reproductive goals may seem out of reach in the face of partner dynamics, financial insecurity, or scarce access to care. In these cases, baby or not, now or later—these phenomena aren't so much intended or

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whom to reproduce, in ways contrary to what we intended. Rather, it is how that thwarting encroaches in far-reaching ways on how we spend our days and want to be remembered. *Id*. at 15, 164. I stressed that the free-ness of those intentions depends at any rate on the social, legal, and economic structures in which people make decisions about having kids they would be able to raise in safe, healthy, supportive environments. *Id*. at 14–15. This broader understanding of reproductive freedom lays bare the shortcomings of demanding reproductive binaries of intended/unintended, planned/unplanned, wanted/unwanted. These platitudes often fail to capture more intricate and dynamic experiences around pregnancy or pregnancy. Reproductive imaginings and aspirations routinely comprise a mixed bag of wants and desires that obscure precise goals or blueprints for family life. Having a baby "may be cause for elation, apprehension, or ambivalence," I say, not least of all because it can operate to "shore up a [person]'s social, romantic, and professional life, or tear it down." *Id*. at 17–18. When it comes to having kids, preferences may be unclear or variable; objectives unattainable without resources to enact them; and preparations irrelevant to those more inclined to improvise than choreograph. Reproductive intentions are, in a word, complicated. Recognizing rights for procreation needn't erase that complexity, denigrate those who don't go about reproductive life in this intentional sort of way, or deny its centrality in shaping crucial normative understandings and expectations about marriage, parenthood, family, and other critical features of social life.

25. Single people and sex-same or infertile couples "wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in [] processes" that "require a great deal of foresight and planning." Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005). Courts have long justified exclusionary marriage laws "to encourage 'responsible procreation' by opposite-sex couples, who are the only ones who can, in fact, procreate 'by accident.'" *Id*. at 30.

26. West, *Intentional Procreation*, *supra* note 5, at 14.

planned as they just *happen*.[27] Striving to bend reproductive events to your will isn't the only sensible way to go about them.[28]

But intentional procreation has a lot of things going for it. The book highlights three: autonomy, wellbeing, and equality. For one, freely choosing reproductive undertakings gives people the satisfaction that this central part of their lives reflects their own values and priorities—at least as much as it does other forces they don't identify with or subscribe to, whether those are legal (e.g., state restrictions), economic (e.g., insurance coverage), professional (e.g., medical negligence), or social (e.g., group pressure).[29]

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27. *Cf.* OLIVER O'DONOVAN, BEGOTTEN OR MADE? HUMAN PROCREATION AND MEDICAL TECHNIQUE 3 (1984) (discussing "spontaneities which depend upon the reality of a world which we have not made or imagined, but which simply confronts us"). I myself have discussed this point in some earlier work. *See* Dov Fox, *Retracing Liberalism and Remaking Nature: Designer Children, Research Embryos, and Featherless Chickens*, 24 BIOETHICS 170, 174 (2010); Dov Fox, *Selective Procreation in Public and Private Law*, 64 UCLA L. REV. DISCOURSE 294, 310–16 (2016).

28. Worthy alternatives accommodate the role of "fortuity, luck, randomness" as "unexpected turns to welcome" in a live marked by fragile contingency. West, *Intentional Procreation*, *supra* note 5, at 18. West worries all this "forming-a-plan-and-sticking-to-it" will leave parents ill-equipped to cope with the inexorable twists and turns of raising a child. I myself have argued that "however [the] child turns out, her being loved is necessary for her to develop a range of essential capacities like knowing how to love others and having a positive conception of herself." Dov Fox, *Parental Attention Deficit Disorder*, 25 J. APPLIED PHIL. 246, 247 (2008). The best parents "honor[] the value they find within the child, rather than changing what they find, so that it looks valuable to them." *Id*. But parental acceptance can be too passive, "letting a child's talents lie fallow, or standing idly by in face of [her] destructive tendencies" in a way that "indulges the child, deprives her of direction, or neglects her." *Id*. To guide a child toward a life that's good for her, parents also have to do a lot of intending and planning about everything from food and school to friends and values. *See id*. at 246–47. Parenting well nourishes this dynamic "tension between shaping a child's given needs, interests, and gifts" and "permitting those endowments to emerge and unfold according to their own characteristic nature." *Id*. at 247. Perhaps too much reproductive intending *could* incline future parents to be overbearing. I doubt there's good evidence either way. But if it turned out that reproductive planners end up becoming Tiger Moms and helicopter dads, that also might suggest that too *little* intending or preparation risks apathy or indifference. Besides, prenatal attitudes about family planning may not last *after* giving birth, anyway. Caring for a baby can leave parents chastened by everything from sleep schedules to food allergies that defy their say in the matter. Which leaves scarce reason to think that recognizing reproductive harms will exacerbate hyper-parenting, let alone in ways that appreciably affect the experience of childrearing, or that child's opportunities to flourish.

29. FOX, BIRTH RIGHTS AND WRONGS, at 14. For discussion, see Dov Fox, *The State's Interest in Potential Life*, 43 J. L. MED. & ETHICS 345, 349–52 (2015); Dov Fox, *Prenatal Screening Policy in International Perspective: Lessons from Israel, Cyprus, Taiwan, China, and Singapore*, 9 YALE J. HEALTH POL'Y L. & ETHICS 471, 478–82 (2009).

Intending procreation also lets would-be parents ready themselves for the challenges of parenthood. This rhetoric of choice has been criticized as "rife with undercurrents of consumerism and pleasure-seeking. 'Autonomy talk' carries with it this partisan baggage that's come to define abortion politics."[30] That's why the book sees less value in reproductive *choices*—for the sake of having chosen whether to have a child, or when, or how many children to have—than in the characteristically far-reaching *consequences* these sorts of choices have for "health, education, employment, social standing, intimate relationships."[31]

Protecting people's intentions about having kids (or not) doesn't just enlarge opportunities for autonomy and wellbeing. It also promotes equality for female, trans, gay, unpartnered, infertile, and other would-be parents who finds themselves at a reproductive disadvantage:

> Gendered expectations of pregnancy and parenthood trade on caretaker stereotypes of women as self-denying nurturers who should assume domestic roles as wives and mothers. Disproportionate demands on women's bodies, time, and resources curtail their opportunities for school, work, and "equal citizenship stature." . . . Faulty birth control and fetal misdiagnoses can erode equality between the sexes as surely as limiting access to those services and procedures in the first place. Meanwhile, higher-tech mishaps like lost embryos and switched donors fall hardest on those who need help to form families. Surrogacy and *in vitro* fertilization (IVF) promote new forms of equality for people who can't conceive or gestate due to age, health, sexual orientation, the trauma of past pregnancy, or the risk of transmitting disease.[32]

West does appreciate that assisted reproduction opens biological parenthood "to a much larger number of people," while the "shift to intentional rather than accidental or forced procreation . . . goes some distance toward recognizing women's full humanity."[33] Protecting these ways to plan out family life empowers gender and sexual minorities to recover a measure of the freedom and flexibility they've long wanted for when it comes to whether, when, and how to reproduce.

To be clear, West wouldn't let reproductive malfeasance go unredressed. She just balks at calling out the resulting harms by name—procreation deprived, imposed, and confounded—for fear of valorizing the intentional approach those rights would protect. Why insist on these novel actions, she asks, when you could plead available ones like negligent infliction of emotional distress for existing damages like pain and suffering and loss of companionship or enjoyment of life? What's more, conventional remedies are more likely to succeed as a matter of litigation strategy. I agree that

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30. FOX, BIRTH RIGHTS AND WRONGS, at 15.
31. *Id*.
32. FOX, BIRTH RIGHTS AND WRONGS, at 15–16. *See also id.* at 14, 34, 64–65, 138, 154.
33. West, *Intentional Procreation*, *supra* note 5, at 26.

courts are generally conservative institutions that tend to favor incremental changes over transformative ones. But I think West overestimates how likely named torts are to reinforce the planned approach to family life, or how bad a thing such reinforcement be, so long as non-planners have suitable support as well. And I think she underestimates how stubbornly judges have resisted remedies for reproductive losses under contract,[34] property,[35] and tort doctrines like fraud[36] and false advertising,[37] negligence[38] and products liability,[39] informed consent[40] and medical malpractice hybrids like wrongful birth, wrongful life, and wrongful pregnancy.[41]

Then there's the content and meaning of those entitlements. West's preferred proxies gesture in the direction of reproductive loss, working around the periphery of why they matter, and grasping at piecemeal features of their accompanying dashed expectations or mental anguish. Named rights recognize what matters about reproductive aspirations—both to the people denied them and to the larger society. My proposed protections capture and vindicate what's distinctively harmful about wrongful interferences that deprive, impose, or confound procreation. Here's how I explain it in the book:

> Anxiety, disappointment, and sorrow are part of any reproductive injury—they're not the whole of it, though, or even most. The loss of prenatal misdiagnosis goes beyond the "shock of discovering" that parenthood will take a radically different shape, after an ultrasonographer failed to report a ravaging disorder. And the lasting consequences of an embryo mix-up reach further than any "psychological trauma" associated with [learning their genetic child could] "be born to someone else and that they might never know his or her fate." "[S]hock" and "trauma" . . . don't speak to the frayed marriages or haunting loneliness that reproductive negligence predictably incurs to lived experiences and personal identities.[42]

These practical impacts get lost when claims for thwarted family planning are shoehorned into claims that range from inept—deeming lost embryos "persons" or "property"—to jarring, like referring to a child's birth as

34. FOX, BIRTH RIGHTS AND WRONGS, at 37–40.
35. *Id.* at 49–51, 100–04.
36. *Id.* at 78–93.
37. *Id.* at 69, 101, 107–08, 114.
38. *Id.* at 30–31.
39. *Id.* at 56–57, 156–57.
40. *Id.* at 32–33, 137–38.
41. *Id.* at 40–49.
42. *Id.* at 67–68.

"wrongful."[43] Protections for procreation deprived, imposed, and confounded needn't exclude concerns other than reproductive intentions. These rights can flourish in a social and legal landscape that also affirms ideals like parental humility, collective responsibility for the vulnerabilities we all share, and equal citizenship with respect to matters of race, class, gender, disability, sexual orientation, marital and immigration status, or otherwise.[44]

West thinks it's one or the other: rights for negligence victims, or justice for everyone else. She compares two kinds of couples. The first intends a baby, no baby, or one who's born healthy or genetic kin. If that intent is "thwarted by a negligent third party, on Fox's proposed expansion of tort law," this first kind of couple "may have an actionable claim against the private party whose negligence occasioned that harm."[45] West contrasts this first kind of couple with a second that faces identical reproductive fates—an empty crib, a child they aren't in a position to raise, or one who's unwell or unrelated—the only difference being they can't pin those losses on a badly behaving specialist. She says it's unfair to reserve procreation rights for the first kind of couple, and deny them to the second. "[T]he commonality between these two couples seems to outweigh any sensible distinction that could or should be drawn between the two: the magnitude of the harm both couples are suffering . . . dwarfs the fact that the first couple had a thwarted intention, but not the second."[46]

West's real target seems like torts' moral luck problem that denies remedies "for an injury which is similar or identical to that suffered by someone who had the bad luck not to have also been the victim of provable negligence."[47] But her claim is specific to reproductive losses. She argues that righting *these* wrongs runs the risk of legitimating *other ones*.

> The suggestion that justice requires that only the first couple receive compensation, because only that couple suffered thwarted intentions, strongly suggests that the second couple not only will have no tort action, but also has no justice-based grounds at all for assistance inside or outside of tort law. It seems to imply, in other words, that it is only thwarted *intentions* . . . that are deserving of compensation. That is the work done by tort law's legitimating rhetoric: precisely by compensating for some injuries in life, it strongly suggests that *that* is all justice requires; that the injuries that otherwise befall us are of no communal concern. Of course, this is illogical: it doesn't *necessarily* follow—as a matter of law or logic. That the first couple receives compensation for thwarted intentions doesn't suggest that

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43. *Id.* at 37, 43.

44. *Cf.* Mary Ziegler, *Reproducing Rights: Reconsidering the Costs of Constitutional Discourse*, 28 YALE J.L. & FEMINISM 103, 141–46 (2016) (charting the evolution of choice arguments in the aftermath of *Roe v. Wade*).

45. West, *Intentional Procreation*, *supra* note 5, at 24.

46. *Id*. at 24–25.

47. *Id*. at 24.

> the second couple doesn't deserve assistance, for instance, as a matter of social justice. But nevertheless, it may well follow as a matter of loose, legitimating rhetoric. By compensating the first couple, it might seem, we've exhausted the demands of justice . . . [leaving the second couple the victims of] bad luck, which means they are on their own.
>
> This seems like a very high rhetorical cost to bear. . . . the difficulties both couples will face as parents seemingly call out for some sort of sympathetic and societal response to both, rather than to one but not the other. The callousness or inhumanity of saddling the second couple with these extraordinary costs—rather than having any sort of rational and compassionate system for spreading the[se] costs . . . regardless of whether or not expectations were thwarted by negligence—may be perversely legitimated by the identification of a small subset of such parents who, unlike the others, receive the benefit of tort law, for redress of their thwarted intentions.[48]

I share her sense that the couple who didn't intend or make plans—perhaps because they lacked access to reproductive care in the first place—may indeed deserve no less support. Where we disagree is whether this gives reason not to fully vindicate victims of reproductive negligence, and which more particular forms such support should take.

Tort remedies against having procreation wrongfully deprived, imposed, or confounded don't presuppose far-reaching economic redistribution and government social support systems. Nothing in my proposed rights requires signing onto a progressive vision of political philosophy or social policy. But just because the unintending couple could have chosen otherwise doesn't mean they should bear the repercussions. We don't deny urgently needed medical care to individuals even if they easily could have made safer choices that would have avoided getting hurt. Nor do we deny neonatal treatment to the babies of women who declined to terminate a difficult pregnancy. (But neither does it mean that remedies for the two groups, if any, should be the same.) The book explains that some options are too much to ask of anyone, and that some needs are too important to go unmet.

> Insisting that negligence victims cut off ties with a fetus or child as a condition of recovery disrespects their [reproductive] interest[s]. . . . Forcing their hand yet again only exacerbates that injury. . . . Raising [an] unplanned child may be worse for them than the childless future they'd hoped for—but abortion or adoption may be worse than either of those. . . . It's unreasonable to condition recovery on the expectation that [they] extinguish [a] fetus . . . or relinquish care of the child she gave birth to. Plaintiffs shouldn't be denied the compensation they'[d] [otherwise

48. *Id*. at 25–26.

> be] entitled to just because they exercise their protected liberties to decline abortion or adoption.[49]

The same goes for parental leave, affordable preschool, welfare support, health and disability insurance, and other ways of meeting family's needs. The reason to meet those needs isn't that parents "intend well" and "choose responsibly"; or didn't "assume the risk" or "get themselves into it." It's because we respect people for their human value, vulnerability, and membership in our community. West gives no reason to think reproductive justice is a zero-sum enterprise that pits the claims of some against the others. It seems to me at least as likely that vindicating rights against badly behaving specialists would strengthen broader demands to vindicate those same interests for people who didn't choose, or couldn't escape the adversities they face. The child tax credit in the 2021 American Rescue Plan at least gestures toward this more charitable and inclusive posture that would level up—all families—regardless of how they came to be.[50]

All this is of course speculative. I could be wrong. It's possible the legal changes I propose make society less generous in the ways West predicts. That would be a real cost of the reforms I advance. But this "legitimating" cost, if it did come to pass, doesn't thereby give decisive reason to oppose these reforms. We must still in that case ask why negligence victims should be the ones expected to shoulder the burden of responding to that cost. Recall that these are people who'd already been disadvantaged or marginalized by the infertility, pregnancy, or genetic risks that forced them to seek help having kids or not. Misconduct exacted further indignities that may be mitigated by virtue of procreation rights that lie within their reach. It's unreasonable to insist they sacrifice the redress they're entitled to. Parental leave, child care, medical coverage, broad access to birth control, fertility treatment, other reproductive health services—when these measures are carefully designed, with attention to any unintended consequences, they are essential ways of making our society more decent and improving life for underprivileged individuals and families. But we should use the political process to make this a reality for everyone, consistent with what justice requires for victims of reproductive negligence. That imperative is why the book ultimately eschews *Roe*'s "formalistic sense of autonomy" in favor of a "functional version that would grant reproductive access to women of limited means."[51]

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49. FOX, BIRTH RIGHTS AND WRONGS, at 125–26.

50. *See* The American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (1st Sess. 2021).

51. FOX, BIRTH RIGHTS AND WRONGS, at 15. For discussion, see Khiara M. Bridges, *Beyond Torts: Reproductive Wrongs and the State*, 121 COLUM. L. REV. 1017, 1033–40 (2021) (reviewing BIRTH RIGHTS AND WRONGS).

West isn't the only commentator to champion government funding for families in need. David Wasserman argues that greater social support would relieve the moral pressure that demands of corrective justice risk placing on prized norms in matters of procreation. He calls

> for the state to reduce the need for legal claims [for procreation deprived, imposed, and confounded] by absorbing many of the expenses of raising children, especially disabled children, now borne by their parents—giving victims of reproductive negligence less incentive, and need, to seek compensation [in the first place].[52]

Where West's primary concern lies with the expressive and rhetorical side effects of recognizing rights for pursuing or avoiding parenthood, Wasserman directs his critique toward my proposed protections for interests in selecting offspring, especially for health, against disease. He argues the moral costs of compensating for confounded procreation are greater than I acknowledge.

> In seeking compensatory damages, the plaintiffs are not only demanding redress for the affront to their autonomy, however wisely it may have been exercised; they are treating the consequences they sought to avoid by that exercise as harms for which they deserve to be compensated. But many of those consequences are inseparable from the child they now love and cherish, in the sense that they could not have had that child without those consequences. There is thus a tension between the demand for compensation and the attitude of unconditional love and acceptance the plaintiffs aspire to maintain towards their child.[53]

For Wasserman, this tension arises where the reproductive consequences that parents seem to complain of—ending up with a child of one essential genetic

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52. Wasserman, *Moral Cost of Compensatory Damage Claims*, *supra* note 6, at 33.

53. *Id*. at 32. Wasserman is right that my proposed reframing targets reproductive harms beyond loss of freedom. Recovery on grounds of agency alone is complicated for a couple of reasons. First, the concept of autonomy is ambiguous: Is it just personal or also relational? Does it include immediate desire or reflective aspirations? More challenging is it that the relative strength of thwarted preferences fails to distinguish more serious injuries from less in a principled way. But the biggest problem with compensating for the wrongful frustration of reproductive autonomy is this: it does not get to the heart of what these victims are suing for. Their suffering has less to do with free choice than with why they wanted kids or didn't in the first place and the practical effects of that reproductive project being stymied. Take the negligent failure to screen or diagnose a disease parents had hoped to avoid. The inquiry into damage awards would center on "the foreseeable range of implications for offspring lifespan, impairment, medical care, and treatment options," such that "the reproductive injury will tend to be less serious for conditions whose symptoms milder, treatable, and uncertain to manifest." ACB v. Thomson Med. Pte Ltd. [2017] SGHC at paras. 115–18, 120–21, 128–30 (Sing.) (citing Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 179, 174 (2017)). For incisive discussion of these concerns and others related to the legal recognition and remedy of autonomy violations, see Gideon Parchomovsky & Alex Stein, *Autonomy*, 71 U. TORONTO L.J. 61, 65, 72 (2021).

type rather than another—can't be separated from the existence of the child herself.[54] And he appeals to a key feature of society—parental love and acceptance—that's desirable for sound child development and relationships both in the family and beyond it.[55] To be clear, Wasserman isn't saying that prospective parents need to accept their child's debilitating disease or disability, as if they would be wrong to try to correct or mitigate that illness or anomaly, either before or after birth, of course assuming the measures adopted aren't too risky or painful or burdensome for the child. His view is that when the child herself can't have existed without that condition, parents should still welcome her uncritically, an attitude that Wasserman says can't be reconciled with their seeking compensatory damages for the misconduct that resulted in their getting this child instead of some other different one.

Wasserman's reservation is a serious one. Twenty-four states close their courthouse doors to patients who fall prey to fetal misdiagnoses, embryo switches, and donor misrepresentations, banning such lawsuits under the anachronistic pejorative of "wrongful birth."[56]

> Lawmakers and judges variously explain that allowing those suits would offend vulnerable groups or children who'll receive a message that their parents would have been better off without them. Some judges deny compensation so that children won't be cast emotional bastard[s]. Others dismiss claims outright to avoid the

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54. Wasserman doesn't see a problem with parents suing if they'd sought prenatal testing for other reasons. Some parents, the book explains, "want the chance to prepare their home or heart for a baby affected by genetic disabilities, or for the likelihood of fetal or neonatal demise. And others hope to enable timely medical or surgical treatment of a condition immediately after birth, or even before it." The latter—the ones who'd intervene on the developing child itself—might appeal to prenatal advances that have made it possible for doctors to operate "in utero on dozens of fetuses to repair spinal columns that don't close right in the 1,500 to 2,000 children born with spina bifida each year in the United States." FOX, BIRTH RIGHTS AND WRONGS, at 45. The former, meanwhile, seek "to make medical or financial preparations. For example, if the fetus turned out to have Down syndrome, they would make arrangements to give birth in a tertiary care hospital because of the greater odds that it would need neonatal cardiac surgery. Or they might set aside more money for more costly childcare and tutoring in a state with poor 'special education.'" Wasserman, *Moral Cost of Compensatory Damage Claims*, *supra* note 6, at 35–36. Parents in both categories might find themselves victims of confounded procreation. But these aren't the ones whose claims for compensatory damages provoke the tension Wasserman's worried about.

55. I have myself written in this expressive register about reproductive practices before. On their implications for norms of social equality, see Dov Fox, *Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos*, 33 AM. J. L. & MED. 567, 594–602 (2007). On reasonable pluralism about norms of parental love, see Dov Fox, *Choosing Your Child's Race*, 22 HASTINGS WOMEN'S L. J. 3, 11–13 (2010). On the ethics and law about norms of respect for life, see Dov Fox, *Interest Creep*, 82 GEO. WASH. L. REV. 273, 303–12 (2014).

56. For discussion, see Dov Fox & Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act*, 2009 UTAH L. REV. 845, 889–90.

> "unseemly spectacle of parents disparaging the 'value' of their children or the degree of their affection for them in open court."[57]

It's something like this last idea that bothers Wasserman. It gets at a normative friction when parents sue for compensatory damages after setting out to have a different type of child, as if declaring the one they ended up with a mistake. The book doesn't overlook this concern.

> Recovery for confounded procreation flouts a powerful social expectation that parents will embrace their offspring with open minds and hearts: regardless of their genetic particulars, no matter what traits they're born with, and however their lives appear positioned to unfold. . . . On this view, choosing offspring for straight teeth or athletic process goes against everything that parental love should be: patient, devoted, and unconditional. . . . And compensating for stymied efforts would embolden only more finicky shopping among donors or embryos for various features that parents find desirable.[58]

It's that very discomfort that leads me to limit baseline recovery for thwarted race selection, "with explicit caveats" designed to blur hierarchies and "affirm[] the worth" of disfavored groups.[59] I'd try to "blunt the sting of judicial insults" by framing remedies in ways that don't "trade on dubious assumptions" about people's differences or imply "their very existence amounts to a legal harm."[60] For example, I suggest courts treat impairments as just some among the myriad variations that might matter to certain aspiring parents, thereby directing the focus away from this child or that condition.[61]

Wasserman argues these efforts aren't enough—they can't be—because he says the "tension Fox sought to avoid" is ultimately inescapable.[62] Wasserman's objection has to do with social values and meaning, not parental conduct or child welfare. He's not suggesting that it'll hurt a child's sense of self-worth if parents sue because he wasn't healthier or genetically related, taller or better performing, in school or sports or

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57. Dov Fox, *Privatizing Procreative Liberty in the Shadow of Eugenics*, 5 J. LAW & BIOSCI. 355, 365 (2018) (citations omitted). For discussion, see FOX, BIRTH RIGHTS AND WRONGS, at 40–47.

58. FOX, BIRTH RIGHTS AND WRONGS, at 163–64.

59. *Id.* at 160. I've hummed a few more bars about these ideas in a number of papers. *See* Dov Fox, *Reproducing Race in an Era of Reckoning*, 105 MINN. L. REV. HEADNOTES 233 (2021); Dov Fox, *Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection*, 104 CORNELL L. REV. ONLINE 114, 127–36 (2019); Dov Fox, *Race Sorting in Family Formation*, 49 FAMILY L.Q. 55, 60–63 (2015); Dov Fox, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1874–86 (2009).

60. Fox, BIRTH RIGHTS AND WRONGS, at 142–43.

61. *See* FOX, BIRTH RIGHTS AND WRONGS, at 157.

62. Wasserman, *Moral Cost of Compensatory Damage Claims*, *supra* note 6, at 32.

music. His idea isn't that choosy parents will have heightened expectations that will in turn heighten their sense of disappointment, or the disapproval they visit on their kids if those expectations aren't met. The book argues that experiences in pregnancy and early years tend to bridge any distance between prenatal hopes and reality with the ordinary bonds of attachment.

> By the time the child is old enough to understand the nature of the legal issues surrounding its birth, [his] position in the family will already be secure. And the Rhode Island Supreme Court has suggested it "may in fact alleviate the child's distress" to learn "that someone other than the parents" was "pay[ing] for the cost of rearing him." It concluded that parents are better positioned than courts are "to decide whether a lawsuit would adversely affect the child and should not be maintained" for that reason. Any self-doubt a child may suffer upon discovering that his parents sued over the (mis)conduct that made him how he is may be less bad for him, on balance, than the family's struggle to provide for his basic medical and education needs without the financial relief they're entitled to.[63]

These parents aren't saying they wish their child hadn't been born. They just think the specialists they entrusted with their reproductive interests owed them more than a negligent failure to detect or warn them about, for example, the serious medical risks now facing their children.

The exchange I shared with one such mom is instructive. Her name is Linda. A sperm bank misrepresented the donor she picked from its catalog of profiles, failing to disclose that he had been diagnosed with a potentially debilitating mental illness with a hereditary component.

> *Linda:I've made a choice, and love her to death, and, hindsight, yeah, I mean, I would pick a different donor.*
>
> *Dov: And then you would've ended up with a different kid.*
>
> *Dov: I wonder how you help her make sense of that.*
>
> *Linda: She said, "Well, you mean you wouldn't have me?" And I said, "I know." I said, "You wouldn't be here. It might be a different version of you, right?" And she goes, "Yeah, but you would so miss me." And I said, "Absolutely." "Yeah, but how would you ever live without me?" And I said, I know, I can't even imagine. It's hard for her to understand, and it's hard for me to understand.*[64]

Wasserman doesn't doubt that parents like Linda love their children, or deny their devotion to them. He doesn't think they regret their kids' existence, or wish they hadn't been born. He recognizes they're just "trying to ensure that they will have the financial resources to take care of a type of child they never intended to raise; resources they require because of the

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63. FOX, BIRTH RIGHTS AND WRONGS, at 142, 22–23, citing Emerson v. Magendantz, 689 A.2d 409, 422 (R.I. 1997) (Bourcier, J., concurring in part and dissenting in part).

64. DOV FOX, DONOR 9623: ONE MAN. 36 KIDS. THE BIGGEST HOAX IN REPRODUCTIVE HISTORY Ep. 5 (Audible 2020).

provider's negligence."[65] And he wouldn't bar them from bringing suit or "insist that such parents forego needed resources rather than press claims that are inconsistent with unqualified acceptance and love."[66] Whatever good compensation would bring them, though, Wasserman says it comes at a price I fail to grasp.

He sees a conflict between (1) the unqualified way that parents are supposed to embrace their kid, warts and all, and (2) their asking to be compensated for misconduct that gave them that kids instead of some other one, or none at all. These two attitudes are incompatible, in his view.

> The reproductive plan thwarted by negligence sought to prevent the existence of any *child* with the condition this child has, as the only possible way to avoid the *condition* that this child has. In seeking compensation for the condition, the plaintiffs are seeking to come as close as possible to the fulfillment of a plan that would have precluded the birth of this child.[67]

Wasserman argues that this reflects a disquieting disposition, one that's more critical of their child than parents should be. To be clear, he doesn't insist that suing for confounded procreation is tantamount to quality control or treats children-to-be like consumer products that have to meet certain standards, lest they be returned as defective or have their existence repudiated. Their aversion to the traits they'd sought to avoid could find expression in ignorance or prejudice or myopia. But whatever the source of those attitudes, he claims, they're too judgmental for parental love.[68]

I'm not so sure parental love—at least the way it's expressed prior to a child's birth or even conception—either is or needs to be as unreserved or categorical as Wasserman sometimes makes it out to be, even in the idealized sense he means. Here's how the book describes that ideal:

> Parental love, at its best, takes hold before parents learn anything about the sort of person a future child might become. . . . A parent is supposed to love his child without reserve or qualification: That love is for whichever person comes to occupy that special role in the family, whether or not her attributes are ones that the parent wished for or comes to find desirable.[69]

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65. Wasserman, *Moral Cost of Compensatory Damage Claims*, *supra* note 6, at 46.
66. *Id*.
67. *Id*. at 37.
68. Wendy Hensel also resists compensating parents for thwarted efforts to have the kind of child they do. She argues such redress "pits the goals of tort law against the meaning of life itself." Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 150, 166–67 (2005).
69. FOX, BIRTH RIGHTS AND WRONGS, at 162.

To be clear: for Wasserman, unconditional love isn't uncritical or undiscriminating; it's just not qualified by any specific traits or behaviors. It's an ideal that parents often, maybe always, fall short of, but one that he argues quite plausibly is nevertheless worth aspiring to. This ideal certainly serves flourishing children and families well as compared with affection that's tentative or provisional. But these are of course not the only two options; families are diverse, their relationships complicated. And reasonable people can see offspring selection differently. One such view I think reasonable is that parent-child relationships are rich and resilient enough to accommodate caring about a possible kid that's less absolute and more discriminating than unconditional love in the idealized sense.

> To some, like [Michael] Sandel, donor browsing and embryo screening reflect a troubling dislocation of parental attachments. Others, like [Frances] Kamm, see efforts to have children who are "more than healthy" or "better than normal" as innocuous expressions of the admirable impulse to want what's best for them. . . . [On this latter view,] [b]efore a new child is born, "there is no person yet with certain characteristics that we have to accept if we love him and do not want to impose undue burdens necessary for changes." Kamm deems it "acceptable to seek good characteristics in a new person, even though we know that when the child comes to be and we love him or her, many of these characteristics may come and go and we will continue to love the particular person."[70]

This latter conception strikes me as reasonable, well within outside the bounds of legitimate discourse. Indeed, I think Wasserman too would agree that it's perfectly acceptable to try to eliminate or improve debilitating genetic disease or disability in your child, so long as you don't use it as a deal-breaker or basis for compensatory damages if it doesn't work out. At any rate, I think the reasonableness of Kamm's alternative to Sandel's view reveals that the ethics of offspring selection are "essentially contested," in that it's neither "anchored in constitutional norms or common law" nor a matter of "social consensus about public morality or democratic ideals."[71]

It's hardly surprising that there are multiple legitimate ways of thinking about a complex social practice like parenting. Having kids and raising them evokes a mixed bag of postures, including striving to control a child's nature, as tempered by openness to those traits. Wasserman finds unsatisfying the parental reaction that: *We can't help but be unconditionally in love with you, as we knew we would be if we had a child with the kind of trait*

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70. FOX, BIRTH RIGHTS AND WRONGS, at 163 (quoting Frances M. Kamm, *Is There a Problem with Enhancement?*, 5 AM. J. BIOETHICS 5, 10 (2005)).

71. That's why I argue that invoking the ideal of parental love "to void an otherwise justified tort would open judges to charges of legislating from the bench." FOX, BIRTH RIGHTS AND WRONGS, at 162–63.

we sought to select against. But this does not justify, excuse, or mitigate the provider's negligence.[72] I think it's more complicated than this.

> Suing for "wrongful birth" [] makes it sound as if you either love your kid or you hate him. Either you value people with disabilities, or you think they're too flawed in their DNA even to exist. If you recognize this ambivalence I'm suggesting, it's not either/or like that. It's not that you love your kids or you don't; that you think people with disabilities have worth or they're defective.[73]

The book appeals to Carol Sanger's distinction between regretting having had the child you do, and nevertheless feeling a sense of loss about thwarted plans to have a kid who'd be different.

> Regret implies that one would have made a different decision at the time if only one had known (something). In contrast, loss rues not the decision but one or another aspect of its consequences. One experiences loss when one focuses specifically on the costs of a decision, costs that have been weighed against benefits or against the avoidance of even greater costs. Even if one thinks the decision is justified—even if one has no regrets about the decision—the costs that it involved don't cease to be costs, and they may well be experienced as a form of loss.[74]

If your values and circumstances led you to conclude you weren't equipped to raise a child with some debilitating condition, that doesn't mean you won't find all kinds of satisfaction in the baby who ends up being born with it. When parenthood takes a different shape than you'd expected, it can invite an adaptive appreciation along the lines Andrew Solomon describes as "falling in love with someone they didn't yet know enough to want."[75] Other parents may have been well aware of what raising a child with a particular set of needs can involve, may have consciously decided against the financial or emotional toll it would take on their resources available to care for an existing child they're already raising with the very same heritable condition. Just because those parents feel a sense of loss about having to make those painful tradeoffs doesn't mean they regret having had the second child, or would prefer their family be without her.[76]

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72. *See* Wasserman, *Moral Cost of Compensatory Damage Claims*, *supra* note 6, at 45–46 (citing Velleman).

73. Dov Fox, interviewed by Sarah Zhang, *One Sperm Donor. 36 Children. A Mess of Lawsuits*, THE ATLANTIC, Sept. 11, 2020, https://www.theatlantic.com/science/archive/2020/09/sperm-donor-identity-mental-health/616081/.

74. FOX, BIRTH RIGHTS AND WRONGS, at 116 (quoting CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST CENTURY AMERICA 132–33 (2017)).

75. FOX, BIRTH RIGHTS AND WRONGS, at 132 (quoting ANDREW SOLOMON, FAR FROM THE TREE: PARENTS, CHILDREN, AND THE SEARCH FOR IDENTITY 47 (2012)).

76. FOX, BIRTH RIGHTS AND WRONGS, at 116.

It's like so many things in life: aspiration, disappointment, reconciling yourself with what you've ended up with, and hopefully the grace to make the best of it.

This difference between loss and regret doesn't necessarily underwrite compensatory damages. Indeed, it may seem like a legal non-sequitur to (a) remedy a parent's keen sense of loss for the child they regret not having gotten by (b) compensating them for the various additional expenses of raising the child they did get. But Wasserman says parents who sue in cases of confounded procreation aren't just feeling a sense of loss; they're treating the costs as burdens they shouldn't have had to bear, that they're bearing only because of negligence. If they repudiated their decision, they would regard the costs as burdens they should have been willing to bear. They might even think: "We believe now we were wrong to ask the doctor to spare us these costs, but since she took our money and failed to do so, she should get stuck with the bill." Wasserman wouldn't condemn these parents, but he doesn't find their posture morally satisfactory either. I think the loss/regret distinction at least complicates the simplistic logic of wrongful birth doctrine that reduces offspring selection, or complaints of its thwarting, to referenda on parental love.

Victims of confounded procreation are not cold or callous; they're torn and taxed. But this recasting still doesn't resolve the tension Wasserman identifies. It won't do to split the difference by applying the "benefit-offset rule" to reduce compensation levels for intangible losses by the countervailing gains that very same reproductive misconduct brings. Even if a jury could quantify or balance out such considerations, it would be deeply unsettling.

> There's no easy or precise way to work out and tally up the ways in which parenthood's virtues soften the blow of confounded procreation. But these complexities don't warrant refusing awards outright. It's better to identify these trade-offs with all practicable clarity and care . . . than "to permit the law to be blinded to the realities of the plaintiff 's concrete situation for the sake of indefinite abstractions."[77]

In the end, the tension remains. And yet, as Richard Epstein puts the point in his commentary, "the best is not allowed to become the enemy of the good."[78] "We struggle through," he explains,

> even if we are confident that the numbers chosen are more or less pulled out of (not quite) thin air. We unhappily do these calculations because the deterrent and

77. FOX, BIRTH RIGHTS AND WRONGS, at 134 (quoting Smith v. Gore, 728 S.W.2d 738, 744 (Tenn. 1987)).

78. Epstein, *Common Law Lens*, *supra* note 8, at 70.

> compensation objections cannot be served with a zero damage award, so that some positive, even if imprecise, award tends to work better than nothing.[79]

This is hardly a satisfying response to Wasserman's concern. Maybe there isn't one, at least not without appeal to the fragile context and imperfect circumstances within which reproductive controversies take place and play out. But perhaps that very inadequacy is a fitting testament to the imponderables of both fact and value that make these choices so tragic and questions so hard.

Epstein critiques the book through the lens of law and economics. He says I'm seeing the glass half empty. Long-lasting birth control, *in vitro* fertilization, risk-free blood tests that screen for neural tube defects before a child is born? This is the medicine of miracles! It fills empty cribs; spares families debilitating disease; and empowers people to delay or avoid having children. These advances free individuals and couples from the powerful vagaries of natural conception and the genetic lottery. Liability rules of the kind I propose would slow that progress intolerably, in Epstein's view. He's not sanguine about lab mix-ups, embryo contaminations, and botched sterilizations, as if they could be chalked up to reasonable slips of hand or lapses in judgment. He just thinks most of these errors are a cost of innovation we should accept.

Epstein situates the evolution of reproductive medicine within a long line of high-social-value industries "from cars, to roads, to communications."[80] The lesson he draws is that modern innovation is the principal agent of human progress whose social utility outweighs the need to compensate the mounting number of accident victims.[81] On Epstein's historical account, the "quick replacement of obsolete stock with the most current, cutting-edge technology is far more important than any liability for the damages in question."[82] I agree these advances should take priority. But that's not the question; it's whether we should have to choose at all—in other words, whether we can have progress and safety, or whether there is a reasonable

79. *Id*. at 69–70. For discussion of how I'd calculate damage awards, see Dov Fox, *Redressing Future Intangible Losses*, 69 DEPAUL L. REV. 419, 455–67 (2020).

80. Epstein, *Common Law Lens*, *supra* note 8, at 78.

81. *See, e.g.*, Donald G. Gifford, *Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous. Vehicles, and Accident Compensation*, 11 J. TORT L. 71, 126–27 (2018); John M. Staudenmaier, *Rationality versus Contingency in the History of Technology*, *in* DOES TECHNOLOGY DRIVE HISTORY? THE DILEMMA OF TECHNOLOGICAL DETERMINISM 259, 260–61 (Merritt Roe Smith & Leo Marx, eds., 1994).

82. Epstein, *Common Law Lens*, *supra* note 8, at 78.

tradeoff to be made between them. Epstein's chronicling of this history misses a couple key dimensions too. For example, he doesn't mention the industrial origins of negligence doctrine in "the age of engines and machines that have a marvelous capacity to cripple and maim their servants."[83] Epstein also glosses over auto reforms embedded within larger movements for car safety of the 1960s and '70s, when "half of states enacted a no-fault system of recovery for harms arising from motor-vehicle accidents."[84] I can't say with confidence that liability regimes didn't slow innovation in these contexts, or nudge it in suboptimal directions. Maybe it did. But nor do I see very good evidence to conclude with Epstein that liability unduly stifled or hamstrung the progress we saw.

On Epstein's telling, free-market competition drives revolutionary progress that in turn improves countless lives. The threat of legal remedies, however well-meaning, only makes things worse. (It can't also make them better.)

> [T]he ideal system of tort and regulation does not try to minimize the number of accidents that occur without compensation. That number could easily be driven to zero by [imposing] heavy fines on the one hand and tort damage actions on the other but it could in the extreme lead to a world with no mishaps and no activities.[85]

Epstein thinks consenting parties and expert agencies like the Food and Drug Administration are better suited to size up emerging technologies' costs and benefits for individuals and society. He'd limit accountability to private agreements and administrative directives. No court recovery for having thwarted reproductive interests in ways that the clear rules didn't spell out ahead of time. But the rules should be clear enough at least to send the right signals, while minimizing over-deterrence.

Epstein has long advocated replacing American-style medical malpractice with a system of enforced bargains.[86] Tort law usually regulates interactions between parties who are strangers, so they can't allocate liability for adverse events or non-performance. But doctors and patients know each other. People seeking treatment for conception or contraception engage directly with providers they typically sign agreements with.[87] Epstein frames their interaction as a consensual transaction of money for health services. This

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83. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 300 (2d ed. 1985).
84. FOX, BIRTH RIGHTS AND WRONGS, at 30.
85. Epstein, *Common Law Lens*, *supra* note 8, at 71–72.
86. *See* Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1 L. & SOC. INQUIRY 87, 126–27 (1976); Richard A. Epstein, *Legal Liability for Medical Innovation*, 8 CARDOZO L. REV. 1139, 1156 (1987).
87. *See, e.g.*, Jennifer Arlen, *Private Contractual Alternatives to Malpractice Liability, in* MEDICAL MALPRACTICE AND THE US HEALTH CARE SYSTEM 245, 257 (2006); Patrick S. Atiyah, *Medical Malpractice and the Contract/Tort Boundary*, 49 L. & CONTEMP. PROBS. 287, 287 (1986); Mark Hall, *The Legal and Historical Foundations of Patients as Medical Consumers*, 96 GEO. L.J. 583, 591–97 (2008).

exchange lets both sides negotiate for what they want, while holding each other to the terms of their arrangement. In Epstein's view, a contract approach to medical decisionmaking satisfies preferences more efficiently than tort law's rights and duties that impose costs on patients who might not want or need its protections.[88]

Tort law, by contrast, imposes these standards of conduct by default—so patients don't have to haggle over basic competency.[89] Besides potential vulnerabilities if they come in desperate need of reproductive care, there's optimism bias about their chances of being harmed and information asymmetry about the risks of injury. Without any system of warnings, disclosures, reporting mandates, or monitoring regimes in this area, how are patients and consumers supposed to learn about the probability of serious harms?[90] Then there's contract law's cramped conception of compensable harms that excludes damages for emotional harm. Not to mention how reproductive providers exploit the contractual setting to demand waivers providing them complete immunity, and even indemnification.[91] This, even as courts are generally hostile to the "assumption of risk" defense in torts that relieves doctors of liability for the patient who voluntarily (but non-contractually) chooses to face a known risk.[92]

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88. *See, e.g.*, Richard A. Epstein, *Contractual Principle Versus Legislative Fixes: Coming to Closure on the Unending Travails of Medical Malpractice*, 54 DEPAUL L. REV. 503, 505 (2005); Richard A. Epstein, *Medical Malpractice, Imperfect Information, and the Contractual Foundation for Medical Services*, 49 L. & CONTEMP. PROBS. 201 (1986).

89. FOX, BIRTH RIGHTS AND WRONGS, at 40–42; *see also id.* at 56–57 (discussing evolution of products liability law from contract to torts).

90. *See* Dov Fox, *Transparency Challenges in Reproductive Health Care, in* TRANSPARENCY IN HEALTH AND HEALTH CARE: LEGAL AND ETHICAL POSSIBILITIES AND LIMITS 286, 293–94 (I. Glenn Cohen, Holly Fernandez Lynch, & Barbara Evans eds., 2019).

91. FOX, BIRTH RIGHTS AND WRONGS, at 37–40.

92. *See* Anna B. Laakmann, *When Should Physicians Be Liable for Innovation*, 36 CARDOZO L. REV. 913, 942, 966 (2015); *see also* Matthew J.B. Lawrence, *In Search of an Enforceable Medical Malpractice Exculpatory Agreement: Introducing Confidential Contracts as a Solution to the Doctor-Patient Relationship Problem*, 84 N.Y.U. L. REV. 850, 855–59 (2009) (noting that some cases analyzing exculpatory agreements in the medical malpractice context engage in "case-by-case analysis" of "particular bargaining dynamics" and specific contractual language); Maxwell J. Mehlman, *Fiduciary Contracting: Limitations on Bargaining Between Patients and Health Care Providers*, 51 U. PITT. L. REV. 365 (1989) (proposing enforcement of doctor-patient contract only upon successful showing that the conditions for efficient contracting—information and choice—have been satisfied).

In Epstein's view, tort liability dampens discovery and modernization by saddling firms with a superfluous layer of legal controls whose ad hockery tends to breed a chilling uncertainty:

> The correct response in cases of this sort is not to allow juries to second-guess the FDA, whose major weaknesses is to overemphasize the downside of treatments. Rather, the appropriate course of action is to gather this new information in an orderly fashion, after which it can be used to revise the standard warnings and instructions associated with the drug going forward. The greater predictability of outcomes thus obtained is a far preferable outcome to having juries find large verdicts against physicians and companies that have played by the rules. . . .
>
> The effect of that uncertainty is to reduce the flow of capital and expertise into this area, which could in fact slow down the rate of medical and technical innovation with adverse consequences [for] individuals.[93]

The special powers of lawmakers and administrators to investigate facts, hold hearings, and consult experts equip them to analyze the relative merits of incremental precautions. This is indeed a problem that deserves the attention of legislatures and agencies like the FDA. But the absence of meaningful regulation in this space hampers Epstein's faith in it.

The stakes are high—more than a quarter of American women use some form of long-term contraception, while one in every fifty kids born in the United States today is conceived in a fertility clinic or petri dish.[94] And yet oversight is shockingly low. In other areas of health care, states make hospitals monitor and report any major avoidable errors, like mismatched blood transfusions or surgery on the wrong body part. But no agency or authority tracks or polices serious, avoidable in matters of procreation the way that most states require investigations and recording-keeping about "never events" that happen in other areas of medicine (think of surgery performed on the wrong body part or patient). The book details how a brave new world of "test tube" babies came on the heels of culture wars over abortion and birth control. Sterilization, surrogacy, and embryo selection wade into even murkier ideological terrain, sparking divisive questions about when life begins, and what makes a family. Lawmakers throw up their hands while lobbying forces subvert calls to regulate.[95] In 1992, the

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93. Epstein, *Common Law Lens*, *supra* note 8, at 71.

94. *See Contraceptive Use*, CTRS. FOR DISEASE CONTROL & PREVENTION: NAT'L CTR. FOR HEALTH STATISTICS (Mar. 21, 2019), http://www.cdc.gov/nchs/fastats/contraceptive.htm [https://perma.cc/6TQY-633B]; Saswati Sunderam et al., *Assisted Reproductive Technology Surveillance—United States, 2015*, MORBIDITY & MORTALITY WKLY. REP. (CDC, Atlanta, Ga.), Feb. 16, 2018, at 1, https://www.cdc.gov/mmwr/volumes/67/ss/pdfs/ss6703-H.pdf [https://perma.cc/WAX2-FT69].

95. FOX, BIRTH RIGHTS AND WRONGS, at 26–31. Private insurance hasn't rushed in to fill the void. Hospitals and physicians carry coverage for adverse outcomes in most areas of medicine. But fertility is different. Insurers call it a "triple risk activity" that can harm

fertility industry convinced Congress to forbid the FDA from "establish[ing] any standard, regulation, or requirement which has the effect of exercising supervision or control over the practice of medicine in assisted reproductive technology."[96] That's why in 2018, for example, the FDA rejected as beyond its scope a petition to rein in some of the most glaring loopholes among sperm banks in the United States. For example, they aren't required to track the births per donor, which is how those numbers (as revealed by ancestry sites) get into the hundreds. Nor are American sperm banks required to run background checks on donors or test them for fatal disorders their kids might inherit. These institutions don't even have to share actionable medical updates they learn about donors with the families raising kids at risk of a debilitating condition that could be mitigated.[97]

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not just the patient, but a partner and offspring too, any of whom could pursue claims for noneconomic harms atop any medical bills or lost wages. It isn't just that carriers shy away from exposure to the high costs and moral hazard that typify reproductive care. Consumers would have to demand a system of insurance in the first place; pressure for its development would in turn require that doctors see the benefit of buying protection against reproductive negligence. Yet reproductive technology providers get to charge for things out of pocket, without Medicare, Medicaid, or even private insurance as disciplining forces. *See* Dov Fox, *Birth Rights and Wrongs: Reply to Critics*, 100 B.U. L. REV. ONLINE 159, 161–62 (2020).

There is one exception. Two states have experimented with no-fault compensation for birthing-related harms since the late 1980s. Liability insurance premiums had skyrocketed for obstetrician-gynecologists after a wave of high-cost litigation involving newborn neurological injuries. Virginia and Florida transferred claims from civil courts to administrative schemes financed through assessments on mostly participating physicians and hospitals. These schemes replace hard-to-prove negligence claims with guaranteed reimbursement for health care and lost earnings any time a child is born with serious spinal cord or brain injuries from being deprived of oxygen during labor or delivery. Insufficient funding and dwindling subsidies have jeopardized the Virginia and Florida regimes since their inception, however. The hundreds of millions of dollars they've paid out are meager relative to those available through conventional litigation. And injured parties have further destabilized these insurance alternatives by sidestepping them to pursue fault-based actions with the promise of larger awards. No other state has followed Virginia and Florida's lead to resolve either birth-related claims or any other medical injuries in agency offices instead of trial courts. *See* FOX, BIRTH RIGHTS AND WRONGS, at 31, 70–71.

96. Fertility Clinic Success Rate and Certification Act of 1992, H.R. 4773, 102nd Cong., 138 Cong. Rec. 16,685 (1992); 138 Cong. Rec. 8210–11 (1992) (statement of Hon. Ron Wyden); Fertility Clinic Services: Hearing on H.R. 3940 Before the Subcomm. on Health & the Env't of the H. Comm. on Energy & Commerce, 102nd Cong. 98–102 (1992) (statement of Robert D. Visscher, executive director, American Fertility Society). For discussion, see FOX, BIRTH RIGHTS AND WRONGS, at 26–30.

97. *See* Christina Mickle & Wendy Kramer, Citizen Petition (Jan. 1, 2017); Letter from Peter Marks, Dir., Ctr. for Biologics Evaluation & Research, to Wendy Kramer, Dir., Donor Sibling Registry (2018), https://www.regulations.gov/document?D=FDA-2017-P-0052-0203. The agency has so far weighed in only to discourage research on next-generation

Even where the FDA does have authority over reproductive medicine or devices, it has often exercised too little oversight, leaving dangerous omissions.[98] You may have heard about the pregnancy drug diethylstilbestrol (DES) prescribed to millions of women in the 1940s, '50s, and '60s to help prevent miscarriages.[99] The FDA approved DES before manufacturers had even tested it on pregnant mice—research that would've revealed the drug's serious risk of causing cancer in women and congenital anomalies in offspring.[100] Today, the FDA declines to regulate non-invasive blood-test screening for chromosomal abnormalities—available as early as seven weeks in pregnancy. Fetal DNA analysis has become a routine part of prenatal care since the blood tests—now a multi-billion dollar industry—burst onto the American market in 2011. Manufacturers promise an end to big needles, miscarriage risks, and waiting months to learn whether your fetus is healthy. But these findings aren't reliable enough to determine whether a fetus has some disorder. This screening doesn't diagnose. It gives probabilities to detect the need for more invasive and accurate means like amniocentesis. The FDA fails to patrol misleading claims that results are "99% accurate." Unconfirmed mistakes have led many women to keep pregnancies they would have ended, and even more to end ones they would have kept.[101]

The FDA's limited ability or willingness to regulate in this space to date doesn't answer the comparative question that Epstein poses: Would his preferred combination of light agency regulation up front and strict contract enforcement after-the-fact do a better job, on balance, at minimizing errors, maximizing access, and promoting innovation? I don't assume that torts are the most efficient way to strike the right balance between driving advances and deterring mishaps. In the absence of good data about reproductive successes and failures, I can't say how effectively the tort actions I propose would ward off reproductive "never events"—those

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advances like mitochondrial transfer, human cloning, and germline embryo editing. *See* Myrisha S. Lewis, *How Subterranean Regulation Hinders Innovation in Assisted Reproductive Technology*, 39 CARDOZO L. REV. 1239, 1269 (2018).

98. *See* Dov Fox, *Safety, Efficacy, and Authenticity: The Gap Between Ethics and Law in FDA Decisionmaking*, 2005 MICH. ST. L. REV. 1135, 1149, 1859–79.

99. *See* FOX, BIRTH RIGHTS AND WRONGS, at 137. For discussion, see S.H. Swan, *Intrauterine Exposure to Diethylstilbestrol: Long-term Effects in Humans*, 108 APMIS 793, 795 (2000).

100. Bichler v. Eli Lilly & Co., 436 N.E.2d 182, 185 (N.Y. 1982). For discussion, see Dov Fox, *Causation and Compensation for Intergenerational Harm*, 96 CHI.-KENT L. REV. ___ (forthcoming 2021).

101. *See, e.g.*, *Prenatal Tests Have High Failure Rate, Triggering Abortions*, NBC NEWS (Dec. 14, 2014, 3:12 PM PST), http://www.nbcnews.com/health/womens-health/prenatal-tests-have-high-failure-rate-triggering-abortions-n267301 [https://perma.cc/QL6D-AA8U]. For discussion, see FOX, BIRTH RIGHTS AND WRONGS, at 27.

egregious mix-ups that could have been easily prevented—or whether they'd pass along the cost of payouts to future patients and drive practitioners away. Even the fear of big damage awards could invite them to implement gratuitous safeguards that drive up prices and limit availability for people who can't afford it. These concerns didn't escape me in writing the book. I'm mindful throughout that liability risks could chill innovation or reduce access.[102]

Nevertheless, tort relief spreads losses more widely, rather than concentrating them on injured parties. After-the-fact liability has advantages. Individual plaintiffs are motivated to get justice; juries are immune to partisan or administrative capture; the case method picks up early, gradual, and contextualized, if partial, data about emerging trends; and high-profile verdicts can be catalysts that spur further action by alerting society and political leaders to the need for structural changes.[103] But what drives my analysis is more naïve than matters of innovation and deterrence: the simple sense people should be remedied for the negligent thwarting of their reproductive interests. The law's failure to compensate these victims lets that wrongful harm persist.

Epstein thinks I prove too little. Reuven Brandt thinks I prove too much. He argues that the reasons I commit myself to actually carries my logical conclusions further than I recognize or perhaps am willing to admit, and in two critical respects. First, the harms and wrongs that lead me to propose remedies when negligent professionals (doctors, pharmacists, lab technicians) deprive, impose, or confound procreation also justify liability for deceptive intimates (in the book, I call them "lovers who lie") who trick their partners to the same effect.[104] His second argument concerns cases of procreation deprived or confounded that involve denying people the genetically related kids they set out to have: "If we are prepared to legally acknowledge [] harms in the case of adults who are deprived" of the genetic affinity with offspring that is for some "a central impetus behind their desire to reproduce," then "we have a prima facie reason to recognize these harms when they arise in children" who are denied a similar source of lineal connection with their parents.[105] He argues children's interest in sharing that biological tie gives reason to resist the widespread practice of anonymous donor conception.

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102. FOX, BIRTH RIGHTS AND WRONGS, at 35–36, 70–71, 110.
103. *See* Mary L. Lyndon, *Tort Law and Technology*, 12 YALE J. ON REG. 137, 162–63 (1995).
104. *See* Brandt, *Birth Rights and Wrongs Extended*, *supra* note 7, at 50–56.
105. *Id*. at 58.

I'm largely persuaded by both of the ways Brandt proposes to extend the book's ideas into these adjacent contexts. But my general agreement comes with some distinctive reasons and practical reservations I'll set forth below.

I don't insist that courts discipline people who mislead partners about whether or not they're sterile,[106] using birth control,[107] or pregnant.[108] "Intimate partners don't owe each other a formal kind of obligation of the kind that medical specialists do to those they serve," I explain.[109] Unlike "sperm bank operators, fertility doctors, and OB/GYNs," intimates don't "breach any duty of reproductive care" when they deceive partners in matters pertaining to reproduction.[110]

> Fox settles on the absence of a formal duty of care as the best justification for exempting private reproductive wrongs from his proposed tort schema. Fox is correct that the standard of care owed by medical professionals or others who have entered into a formal contractual agreement is greater than the standard of care owed by private parties engaging in sexual activity. . . . But accepting that professionals have a heightened duty of care does not establish that 'caveat emptor' is the correct legal response to claims of private reproductive wrongdoing. Concerns about justice and consistency provide strong reasons for recognizing private reproductive wrongs.[111]

I left deceptive partners aside to shore up the doctrinal credentials of three new rights I propose. That seemed like enough to take on as it applies to actors bound by duties of contract exchange or specialist torts or professional expertise claims. A step too far, I figured, to impose those obligations beyond the law's reach, outside of consumer markets and health care. Brandt finds this unsatisfying on my own terms. He thinks courts should treat bedroom deceit on equal footing with professional negligence, since both violate trust and disrupt lives just the same. Brandt would remedy all reproductive wrongs, not just those visited on people whose plans require help from third parties—doctors or donors, pharmacists, or surrogates. It's true that practitioners commit themselves to providing competent reproductive care to the patients or consumers they agree to help.[112] But this obligation is about more than just the duties specialists voluntarily assume. It also comes from

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106. *See, e.g.*, Conley v. Romeri, 806 N.E.2d 933, 935–39 (Mass. App. Ct. 2004); Murphy v. Myers, 560 N.W.2d 752, 753 (Minn. Ct. App. 1997).

107. *See, e.g.*, Wallis v. Smith, 22 P.3d 682, 682–83 (N.M. Ct. App. 2001); Desta v. Anyaoha, 371 S.W.3d 596, 598–99 (Tex. App. 2012).

108. *See, e.g.*, R.A. v. O.A.-H., No. CN08-05726, 2009 WL 5697871, at *3 (Del. Fam. Ct. Dec. 31, 2009); *In re* Adoption of S.K.N., No. COA10-1515, 2011 WL 2848751, at *1 (N.C. Ct. App. July 19, 2011).

109. FOX, BIRTH RIGHTS AND WRONGS, at 77.

110. FOX, BIRTH RIGHTS AND WRONGS, at 79.

111. Brandt, *Birth Rights and Wrongs Extended*, *supra* note 7, at 51.

112. FOX, BIRTH RIGHTS AND WRONGS, at 40.

the central role that decisions about having children tend to play in people's opportunities and experiences.

I'm open to applying certain reproductive duties against deliberate domestic deception. I wouldn't automatically condone birth wrongs just because you share a bed with the offender. But I'd insist on proving that intimates meant to deceive in these specific ways—their misconduct would have to be shown worse than negligent. Our laws shouldn't hold a woman liable for taking birth control pills late, or a man who forgets to disclose a risk he's sterile or might pass on a heritable condition. But I'm unmoved by blanket refusal to letting victims of premeditated contraceptive sabotage sue a partner for imposed procreation, for example. A common protest is that intimate partners assume the risk: If you put your faith in someone you shouldn't have—the one-night stand you got involved with too quickly, or the partner you should have known better, or asked more of—it's your fault for not being more careful or discerning. Another objection has to do with the availability of existing remedies. Laws against rape, battery, and sexual assault are capacious enough—or can be readily revised or re-applied in new ways—to accommodate less tangible harms associated with procreation deprived, imposed, or confounded. Alternatively, you might object that Brandt's tort for lovers who lie would rely on especially sensitive or difficult-to-prove testimony involving pillow talk and other "he said, she said" evidence. Or you might think it's valuable to preserve an intimate sphere that operates free of honesty police. This personal space lets us flourish under conditions of vulnerability and trust, or makes room for us to experiment with what is true or good about our own life stories, as part of a process of figuring out who we are, and what particular people and attachments mean to us. Subjecting to potential liability our intimate thoughts and actions about having kids would break down longstanding walls between "public" and "private" that even the leading critics of that barrier would maintain.

Jill Hasday wrote the book on why the law should stand up against harmful lies to sexual partners and family members just like it does a stranger's fraud, misrepresentation, or intentional infliction of emotional distress.[113] Yet even Hasday gives a pass to deception about contraception or fertility that might inflict "significant harm on [a resulting child] by conveying and publicizing the message that [a parent] considered himself injured by their

113. *See* JILL ELAINE HASDAY, INTIMATE LIES AND THE LAW (2019).

existence."[114] The reproductive context is one of just two in which Hasday wouldn't allow claims for intimate lies. Her reason is "the likelihood that permitting tort suits for such deception would harm the children in question" by being made to think that the people who raised them wished they hadn't been born.[115] Child welfare is obviously a compelling reason to limit generally available right or action. And it's not like a child's interests are always the same as the parents. What's good for parents can be bad for their child. Plus, early interventions can have the greatest impact on children's development and wellbeing. But I think the prospect of adolescent distress or insecurity or feelings of inadequacy in the eyes of parents will often carry less weight in this context for reasons I reviewed earlier.[116] Besides, absent evidence of abuse or neglect, the law generally presumes parents know (and care about) what is best for their child.[117] I'd let parents make the call whether to bring a claim against negligent providers. And I'd let victims of reproductive deception sue lovers who lie too.

Brandt's second argument also concerns children's interests, this time in knowing who a biological parent is. He thinks reasonable societies can disagree whether genetic affinity is worth protecting. The case he makes is for consistency: If we protect a parental interest in having kids of their own "flesh and blood," we should give kids a decent chance to enjoy, or at least know about, those connections too. Brandt observes donor anonymity is common practice among sperm banks that hundreds of thousands of single moms and same-sex and infertile couples use every year to have kids. These brokers claim the men they recruit wouldn't keep donating, if the resulting kids might later be able to track them down. Keeping them anonymous keeps them from worrying that the pull of that genetic tie might let children come knocking on their door, asking unwanted questions or seeking unwelcome contact. Lots of sperm banks' customers want that distance too. The idea is that hiding everyone's identities helps keeps parents, donors, and kids from having to deal with the emotional messiness or potential confusion that comes with blurred boundaries about origins and kinship. That's why sperm banks say they keep parties at arm's length.

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114. *Id*. at 219.
115. *Id*. at 221.
116. *See supra* notes 63 and accompanying text.
117. FOX, BIRTH RIGHTS AND WRONGS, at 22–23. I am setting aside the conceptual complications I discuss in the book about welfare comparisons between some present state of affairs and the alternative of nonexistence. These difficulties with establishing causation and legal harm arise from the fact of reproductive wrongs that involve a child who never would have been born had it not been for the very misconduct at issue. *See id.* at 13, 22, 43.

It keeps statuses clear, relationships clean. Brandt is critical of donor anonymity, and thinks I should be too.

> Fox accepts that the interests adults have in forming a parent-child relationship with biological offspring is deserving of legal protection and that compensation is owed when this interest is frustrated. But the reasons for recognizing adults' interest in this kind of relationship apply also to children's interest in having a relationship with their biological parents. Certainly there is a case for some legal protection for these interests as well.[118]

Brandt stops of short of saying that the law should "declare unenforceable contracts protecting the identity of gamete donors on the grounds that such contracts are contrary to the interests of children, and require clinics to release their records."[119] I agree that this question isn't resolved by the fact that any individual child owes his or her existence to the anonymity regime that led this particular man to provide half the child's biology. What happens to resulting offspring still matters.[120]

Brandt says sperm and egg donors owe more to their offspring than the genetic material they provide to the people who raise them.[121] That donors "freely and avoidably choose to engage in a project that has the creation of a new person as its end" generates a non-delegable moral duty, in his view, "to provide offspring with some autobiographical information."[122] I'd add

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118. Brandt, *Birth Rights and Wrongs Extended*, *supra* note 7, at 62.

119. *Id*.

120. Naomi Cahn has argued much the same. *See* Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Individuals*, 42 HOFSTRA L. REV. 1077, 1114 (2013) (resisting arguments set forth in I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187, 1208 (2012)); I. Glenn Cohen, *Prohibiting Anonymous Sperm Donation and the Child Welfare Error*, HASTINGS CENTER REP., Sept.-Oct. 2011, at 13, 13; I. Glenn Cohen, *Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431, 435 (2012). *See also* Naomi Cahn, *What's Right About Knowing?*, 4 J.L. & BIOSCIENCES 377, 382 (2017) (("Parents often use donor gametes so there is a genetic connection between one parent and the child; understandably, offspring may be curious about their other genetic half, and preventing them from such access perpetuates a double standard in which genes are important to parents, but not to their children."); *id*. ("Parents who choose to use donor gametes rather than adopt often do so because they want a child to whom they are genetically related as part of their own expression of individual values. Their children may similarly want to explore both halves of their genetic lineage in coming to their own conclusions about how they think of themselves and how they want to live their lives.").

121. *See, e.g.*, Reuven Brandt, *Gamete Donation, the Responsibility Objection, and Procreative Responsibilities*, 38 J. APPLIED PHIL. 88 (2021); Reuven Brandt, *The Transfer and Delegation of Responsibilities in Gamete Provision*, 34 J. APPLIED PHIL. 665 (2016).

122. Brandt, *Birth Rights and Wrongs Extended*, *supra* note 7, at 64.

mounting research that many donor-conceived people long to know about their donors. They say access to those identities doesn't just quench a deep-seated curiosity, but gives them insight into their social, cultural, and biographical heritage, as well as potentially actionable medical risks.[123] Besides, research suggests fear of donor shortages is overblown. Some donors might walk away if required to release their name. But most care less about hiding their identity than getting paid. They'd just want a bit more money: about $60 extra per deposit, according to one study.[124] And this assurance of anonymity is probably wishful thinking anyway, since you don't have to rely on email leaks anymore to find out where you came from. Nowadays, consumer DNA kits let you spit in a cup, and mail it off to a lab to get a list of genetic relatives who have done the same. The promise of biological secrecy may soon be a thing of the past. That may not be so bad, at least for those who find meaning in "genetic affinity."[125] Brandt does well to observe that includes not only parents. Children also have an interest in knowing where they came from and who they're connected to.

He and the other commentators have my profound gratitude for engaging so critically with the ideas in *Birth Rights and Wrongs*. Their quarrels with the book are real and serious. But that conflict should overlook the key propositions on which we agree: First, U.S. common law turns a blind eye to reproductive negligence; and second, there are at least some circumstances in which that indifference represents an injustice, or at least a tragedy. The critiques contained in the volume argue that my proposed tort actions would harm various communities in distinct ways. For West, tort recognition would deride people whose reproductive lives aren't planned. For Wasserman, these torts risks scorning children who might not have been born but for the wrongful misconduct itself. Epstein worries that liability would leave scientists and doctors less inclined to innovate. As our laws adapt to the reproductive controversies of our time, new rights can and should take care to minimize the impact on technological innovation, children with disabilities, and families that take diverse shapes. My hope is that thinking and talking in terms of procreation *deprived*, procreation

123. *See, e.g.*, Eric Blyth, et al., *Donor-Conceived People's Views and Experiences of their Genetic Origins: A Critical Analysis of the Research Evidence*, 19 J.L. & MED. 769 (2012); Tabitha Freeman, *Gamete Donation, Information Sharing and the Best Interests of the Child: An Overview of the Psychosocial Evidence*, 33 MONASH BIOETH. REV. 45 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4900443/; Sherina Persaud, et al., *Adolescents Conceived Through Donor Insemination in Mother-Headed Families: A Qualitative Study of Motivations and Experiences of Contacting and Meeting Same-Donor Offspring*, 31 CHILDREN & SOC. 13 (2017), http://onlinelibrary.wiley.com/doi/10.1111/chso.12158/epdf.

124. *See* I. Glenn Cohen & Travis G. Coan, *Can You Buy Sperm Donor Identification? An Experiment*, 10 J. EMPIRICAL LEGAL STUD. 715, 734 (2013).

125. ACB v. Thomson Med. Pte Ltd. [2017] SGHC at paras. 127–29 (Sing.).

imposed, and procreation *confounded* will equip citizens, scholars, and jurists to meet the next generation of challenges—from artificial wombs to gene editing—that lie just over the horizon.